SUBMISSION BY COMMERCIAL RADIO AUSTRALIA

REVIEW OF THE COMMERCIAL RADIO STANDARDS

RESPONSE TO THE OPTIONS PAPER BY THE AUSTRALIAN COMMUNICATIONS AND MEDIA AUTHORITY

10 June 2011

SUBMISSION BY COMMERCIAL RADIO AUSTRALIA

Introduction

1. Commercial Radio Australia (**CRA**) welcomes the opportunity to comment on the options paper (**Options Paper**) issued by the Australian Communications and Media Authority (**ACMA**).

2. CRA is the peak national industry body for Australian commercial radio stations. CRA has 260 members and represents approximately 99% of the commercial radio broadcasting industry in Australia.

3. The Options Paper relates to the *Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2000* (**Disclosure Standard***), Broadcasting Services (Commercial Radio Advertising) Standard 2000* (**Advertising Standard**) and the *Broadcasting Services (Commercial Radio Compliance Program) Standard 2000* (**Compliance Standard**) (collectively, the **Standards**). In this submission CRA provides an Executive Summary, followed by consideration of the underlying policy issues and a response to the three issues addressed in the Options Paper.

Overview

- The case for reducing levels of regulation of integrated radio advertising is very strong. The case for increased regulation is commensurately very weak.

- There is an abundance of evidence from many sources that community concern regarding integrated radio advertising is low to very low.

- Even so, community concern is not the appropriate benchmark for considering the case for regulation. A Total Welfare Standard must consider the costs and benefits- community concern is not of itself evidence of those.

- Properly analyzed, increased regulation would result in greatly increased costs with zero or, most likely, negative consumer benefit.

- The ACMA's commissioned research on community concerns exhibits some flaws and could be considered unreliable, as demonstrated by the independent report of Professor Stan Glaser.

- Even so, the research when properly analyzed supports findings from other objective evidence that there is little or no community concern about integrated radio advertising and that consumers are concerned by the programming intrusions created by increased regulation.

- These findings are consistent with recent Ofcom decisions to lower regulation of integrated radio advertising. As a general principle, radio should not be subject to higher levels of regulation than other sectors which have far greater reliance on this form of advertising.

- The appropriate regulatory response is now to introduce a Code which addresses the issues previously addressed by the Standards.

Executive Summary

4. CRA and the commercial radio industry strongly support the option of the introduction of a Code to address the issues under consideration. The industry has a high level of compliance and a stable Code structure. In the normal course the regulatory premise in section 123 is that a Code is the first mechanism to be used in relation to program content, with Standards as a fallback in the event of Code failure. The reasons in favour of reversion to this regulatory model are strong.

5. On the other hand, the case for maintaining the current Standards or expanding them is weak. Properly analyzed, the evidence before the ACMA presents a very strong case that no further regulatory requirements should be imposed on the commercial radio sector, in relation to the areas addressed by the Standards. Furthermore, that evidence also presents a very strong case for the level of regulation on commercial radio to be significantly lowered. These evidence-based conclusions are also supported by the objects and policy underpinning the Broadcasting Services Act (**BSA**), as well as by empirical evidence of the operation of the regulatory regime governing commercial radio.

6. CRA respectfully contends that the Options Paper draws incorrect conclusions from the available evidence and addresses those issues below. The ACMA relies heavily upon two pieces of research: *Community Attitudes to Radio* Content *2010* (**Radio Content Research**) and *Listener Attitudes to Advertising, Sponsorship and Influence on Commercial Radio 2010* (**Advertising Research**). CRA's expert report by Professor Stan Glaser notes that this research evidence is flawed and must be treated with extreme caution. Professor Glaser's report is attached at Attachment 1.

7. The very strong case for not increasing regulation applicable to commercial radio is supported by the independent expert economic analysis of the Competition Economists' Group. This analysis is attached at Attachment 2. The report provides a detailed analysis of the economics of the Australian commercial radio sector and the very negative impacts of further regulation of the sector. The analysis includes an assessment of both costs and benefits of further regulation and finds that the increase in costs is substantial, whereas the likely consumer benefit is negative (that is, consumers would be detrimentally affected by increased regulation) or zero.

8. Finally, brief comment is made about overseas models in the submissions below. Of course, it is dangerous to rely on any overseas model, which is often based on

social, political and cultural considerations which are not relevant to Australia. For example, the UK editorial independence model developed in a society where broadcasting was originally a tax-funded public sector activity where freedom from Government interference was a critical consideration. Even now, tax-funded public broadcasting accounts for about half of all free-to-air media consumption in the UK. That is a vastly different situation from Australia. Nevertheless, the Options Paper has (probably for reasons of timing) not addressed very recent overseas developments which are deregulatory in direction and consistent with the conclusions which are to be drawn from ACMA's research, once properly analyzed. Even within the UK, with its history of an editorial independence model, integrated radio advertising has been subject to a major liberalization in February 2011.

The Regulatory Framework

9. Before addressing the particular issues set out in the Options Paper, something should be said of the regulatory context. Of course, the ACMA is very familiar with the objects of the BSA and the regulatory policy encapsulated in section 4. Nevertheless, subsection 4(1) bears consideration in the context of the Options Paper:

> The Parliament intends that different levels of regulatory control be applied across the range of broadcasting services, datacasting services and internet services according to the degree of influence that different types of broadcasting services, datacasting services and internet services are able to exert in shaping community views in Australia.

10. Of the sectors regulated by the BSA, the commercial radio sector is subject to the highest degree of regulation in the area of advertising content (as reflected in the Standards). No other sector is subject to a regulatory regime of this nature. This is surprising when compared with other sectors, where integrated advertising models are very pervasive. For example, integrated advertising is a very regular feature of both commercial television and online services. In addition, for reasons set out at paragraphs 21 and 33, radio listeners are likely to have a high awareness of the use of integrated advertising in radio, and in all likelihood, a higher awareness than in relation to other services. Furthermore, the evidence of listener concern about integrated advertising in a practical listening context is low, as set out further below. This suggests that the Standards may now be a disproportionate response to the regulatory "need", particularly having regard to the regulatory policy articulated by section 4.

Regulatory Balance

11. A discussion of regulatory policy leads to a further point, which is that the Options Paper states that the two most relevant objects to its consideration are paragraphs 3(1)(g) and (h) (see Options Paper, page 4). Properly considered, any regulatory

proposal must be weighed against each of the BSA's objects, without according any particular object higher weight or relevance. Two examples of consideration of other objects and their relevance are paragraphs 3(1)(c) and (d) of the BSA (although CRA's position is that all objects of the BSA must be considered).

12. Paragraph 3(1)(c) refers to diversity in control of the more influential broadcasting services. This reflects an underlying policy that a diversity of views should be available to audiences. The legislative policy is that the best answer to concerns about concentrated editorial control is a plurality of controllers, resulting in a diversity of views and opinions. Audience choice is the critical underlying policy driver, in terms of this object.

13. Paragraph 3(1)(d) focuses on Australian identity, character and cultural diversity. A critical aspect of this identity is the ability to put views that others disagree with, even to the point that some individuals or groups are concerned by the expression of that viewpoint. If that were not the case, and "concern" became a reason for regulating program content, then a wide range of programs would not be broadcast, or would be broadcast in circumstances where the program was closely regulated. A simple example is a highly factual documentary program on the Gay and Lesbian Mardi Gras, which could be seen by a significant proportion of the community as giving prominence to homosexuality and therefore being of concern - and even offensive (that is the report of the activity is offensive because the activity is offensive). However, neither the BSA nor the legislative policy on which it is premised adopted that view. Instead, a documentary program about Australia's largest lesbian and homosexual event speaks to our cultural diversity. In that regard there is an important difference between concern and community standards. The Advertising Research has wrongly conflated the two, a point developed later in these submissions.

14. Perhaps more broadly, a healthy democracy and a healthy media sector will necessarily involve the broadcast from time to time of programs that cause concern or offence to members or sections of the community. Of course, a central consideration will be whether adequate information is available to permit consumers to make an audience choice. However, the underlying point is that a focus on two objects alone tends to undermine the balancing of competing policy objectives which should be reflected in consideration of any system of regulation implemented under the BSA and as a result, to distort that balance in favour of increased regulation.

The threshold issue: The Case for Regulation

15. As the Options Paper has identified, the key threshold issue is whether there is a need to regulate (and if so, the nature of that regulation). In addressing that issue, the Options Paper makes a serious error in logic. It conflates a registration of audience support for or concern about a proposition with the need to regulate. That is a logically erroneous approach, as a simple example can demonstrate.

16. A “mischief” based legal system looks to address a “mischief” which is in need of correction. Laws do not correct citizen concerns, but the source of those concerns within a practical context. To give a simple example, if listeners were asked whether they regarded as important that radio not encourage acts of mass disorder (such as large-scale riots and destruction and vandalism of buildings), it is reasonable to think that close to 100% of respondents would regard that as extremely important. Even so, the case for a standard dealing with that subject matter is so weak as to be non-existent, despite a likely high of level of concern by listeners if asked the question. However, the approach adopted by the Options Paper would be that given such strong audience concern, a standard to prevent such broadcasts was required.

17. This example underlines the serious flaw in the reasoning adopted by the Options Paper. It also underlines the serious weaknesses in the methodology of the Advertising Research, which are addressed by Professor Glaser in Attachment One and in further detail, below. As Professor Glaser has noted, the Advertising Research has a number of design flaws which have tended to result in the amplification of listener concerns, to the extent that the research is unreliable. Moreover, while encouraging listeners to regard surveyed matters as of concern, the research also did not properly consider the costs of regulation, which include a significant listener cost (for example through constant interruption of programs for on-air disclosure announcements). Radio research over the past 30 years has shown that listeners intensely dislike interruptions to programming, to the point where they abandon the product (by switching stations or turning radio off in favour of other alternatives).

18. Within the limitations of the Advertising Research, the most relevant findings in relation to the question of regulation appear at Table 3 “Sources of concern and offence by listener type 2009”. This table records listener concerns about programs heard over the past year. It is therefore a direct and unfiltered record of the concerns of listeners in relation to radio program content. Importantly, no concern was expressed in relation to announcers presenting advertising content for which they were paid.

19. The absence of listener concern about sponsored announcements is made even starker by the findings at Table 12 “Agreement with statements by commercial AM talkback listeners 2009”. These findings indicate that a majority of surveyed listeners regarded as extremely important or very important, that:

- The actual content of current affairs programs is free from commercial influence;
- There is a clear distinction between advertising and other radio content in current affairs programs; and
- That radio sponsors inform listeners who their sponsors are.

20. These findings disclose that listeners are sensitive to the issues under consideration. Nevertheless, in actual listening the incidence of these problems was so low as to not register amongst the top 11 sources of concern by radio listeners, including commercial AM listeners (see Table 3, referred to above). In terms of allocation of regulatory resources, the case for more regulation therefore appears very low. Conversely, the case for reduced regulation appears strong.

21. This point is further borne out by Figure 26, which indicates that 54.1% of commercial AM listeners had heard an on-air disclosure. This finding confirms that there are high levels of audience awareness that disclosures are required, with the corollary that those surveyed were in a good position to register concern around this area under Table 3 if they had that concern. They did not.

22. It should be added for completeness that 39.5% of these listeners said in Table 26 that they had not heard a sponsorship disclosure, but this is in no way evidence of non-compliance, for a number of very obvious reasons. Firstly, they may listen to programs by announcers with no sponsorship agreements in place. Secondly, they may now have no recall of a disclosure that has been made. In fact, regulatory compliance has been high, as demonstrated by the next paragraph and accepted by the Options Paper.

23. The findings at Table 3 are borne out by empirical data. For example, over the past 5 years the commercial radio industry received a total of 1520 complaints alleging breaches of the Commercial Radio Code of Practice. On the other hand, data from the ACMA's website indicates that there have been only 9 complaints alleging breaches of the Standards since 2000 (with a smaller number upheld). As the ACMA is well aware, these complaints have tended to cluster around a very small number of high profile presenters.

24. The conclusions from this data are clear. While radio listeners place a high value on separation of current affairs and advertising and information regarding announcer sponsorships, in practice the level of concern in relation to actual listening is extremely low- so low that it had to be registered in the "Other" category in Table 3 (raising the strong possibility that perhaps not a single respondent was concerned by this issue, when listening to radio).

25. There is other evidence before the ACMA which strongly supports the conclusion that in practice radio listeners have experienced very low levels of concern in relation to the issues addressed by the Options Paper. For example, the ACMA's consultation process has demonstrated an absence of community concern over the issues that form the subject of the Standards Review:

    - On 23 February 2010, the ACMA held a press conference announcing the Standards Review. On 10 May 2010, the ACMA held a public forum in Sydney, which allowed the public an opportunity to comment. Despite extensive advertising, only 15 people (including ACMA staff) attended the

public forum. The audience was invited to ask questions, but only one person did so.

- The ACMA also invited comments on the Standards Review via Twitter. Only two questions/comments were received via Twitter during the forum.
- The ACMA received only 13 submissions to the Standards Review Issues Paper. Nine of these were supportive of the arguments made by the commercial radio industry.

26. It is difficult to imagine a weaker case for increased regulation, particularly having regard to the policy framework and section 4 of the BSA. On the evidence available, the appropriate options appear to be to maintain the status quo or reduce the level of regulation (for example, by the development of an industry Code).

Other Regulatory Considerations

27. For the reasons set out in the previous section, as well as the reports of Professor Glaser and the Competition Economist Group, CRA urges the ACMA to adopt a more rigorous approach when assessing contemporary community standards. Currently, it relies almost exclusively on its own research, which contains significant limitations and does not provide an appropriate base for the formation of significant public policy.

28. A number of the proposals in the Options Paper would, if implemented, impose a substantial burden on the commercial radio industry, in terms of operational costs and lost revenue. As the ACMA is aware, it is obliged under the BSA to take these issues into consideration when developing regulation, in order to ensure that the burden imposed on the industry does not outweigh the benefit afforded to the community.

29. Accordingly, the commercial radio industry urges the ACMA to consider carefully the economic evidence submitted by the Competition Economist Group regarding the impact on the commercial radio industry of a number of proposals contained in the Options Paper, set out in Attachment 2. CEG found that the proposals set out in the Options Paper were very likely to have a negative consumer benefit (in other words, a consumer detriment), but would conversely impose very significant costs on the radio industry. This is not only a question of reducing the profitability of the radio sector. In regional markets many commercial radio licences are only marginally viable, as well as the lesser performing metropolitan licensees. Figure 3 of the CEG report shows that while radio licensee profitability is highly variable, only 40% of licensees were profitable on 2008-09. While this result was undoubtedly affected by the advertising downturn after the global financial crisis, Figure 3 is nevertheless evidence that a significant proportion of licensees are subject to financial stress.

30. Increased costs have a very real impact on the service offering, employment prospects and future of many in the industry. In addition, there is a very strong public interest in industry participants operating as efficiently as possible, which in turn contributes to an efficient economy able to meet the expectations and improve the lives of Australian citizens. This underlying public interest in articulated in subsection 4(2) of the BSA.

31. CRA submits that in assessing the need for and nature of "community safeguards", CRA submits that the ACMA must identify and quantify the "mischief" the proposed regulations are intended to address and the commensurate benefit from any particular form of increased regulation. That is not evinced by an abstract and methodologically flawed question asking listeners if they are concerned by a particular issue. The "mischief" must be considered in a practical context, which includes whether it is raised as a concern in a practical context (with the overwhelming evidence being low levels of audience interest, let alone concern).

32. The "mischief" in relation to the Advertising and Disclosure Standards is the possibility of listeners being misled or deceived into believing that content is an independent viewpoint or news item, when in fact it is the result of a commercial agreement.

33. The familiarity that listeners have with the integrated advertising practices that are commonly used on other media platforms[1] makes them much less likely to be misled or deceived than was the case 10 years' ago. The likelihood of them suffering such "harm" has decreased. In this environment, it seems appropriate to relax the applicable regulation, to reflect the experience of the listening community. It is also the case that the investigation that resulted in the Standards received national publicity. It is very unlikely that radio listeners are unaware of the practice. This is consistent with Table 5 of the Listener Research, which found that 91.5% of all respondents believed that talkback radio were paid or were likely to be paid by advertisers or sponsors for favourable comments. Bearing in mind that all research will have some margin for error or outrider results, this is a very high percentage indeed.

34. The Standards are also increasingly out of step with comparable media in Australia. Free to air television is not subject to any of the restrictions proposed in the Options Paper – and elsewhere in the world. The ACMA states that in the UK "the complete separation of editorial and other radio content is required in all programs".[2] This is incorrect. In February 2011 the UK regulator liberalized its regulations to "allow the integration of commercial communications and programming".[3]

35. After detailed consideration of several options, Ofcom proceeded with Option C, which permits integrated advertising with "appropriate signaling". Appropriate signaling is a much lesser form of disclosure than a disclosure statement. For example, Ofcom's guidance on this issue states that:

> For example, it may be appropriate to signal:

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[1] For example, Channel 10's *Masterchef* on free to air television.

[2] Page 26, Options Paper.

[3] Ofcom Broadcasting Code Review: Commercial Communications in Radio Programming. Available at **http://stakeholders.ofcom.org.uk/consultations/bcrradio2010/statement/**

- general third party involvement in programming (normally sponsorship) with such statements as "…sponsored by…" or "…with our friends at…" or "…in association with…";

- prize donors by stating that prizes are "…donated by…" or "…courtesy of…" or "…with thanks to…";

- venue-sponsored outside broadcasts by reference(s) to being "here with our friends at…";

- the direct offer of a product or service (on behalf of a third party) by acknowledging that the promotion is "...by/with/from our friends at…"

(see page 75 of Ofcom Paper "Broadcasting Code Review: Commercial Communications in Radio Programming)

36. These requirements are relatively fleeting and far less onerous than present requirements under the Standards. They are also very far removed from the options set out in the Options Paper, which for reasons given below, would be uncertain, confusing, onerous and very costly to implement.

37. Significantly, when introducing its new regulatory regime, Ofcom placed weight on:

- The nature of commercial radio, which must rely on advertising (see paragraph 2.16, Ofcom Paper).

- The increasing prevalence of integrated advertising, especially on television, and the need to treat radio in an equivalent way (see page 1, Ofcom Paper).

- The alienation caused to listeners by constant disclosure announcements. Ofcom research showed a strong interest support for liberalization, emphasizing the points made below by CRA that a restrictive regime creates very strong listener aversion and makes commercial radio a comparatively unattractive medium (see paragraph 2.16, Ofcom Paper).

These are all matters which CRA urges the ACMA to take into account.

ASSESSMENT OF COMMUNITY STANDARDS

Limitations of the ACMA's approach

38. The ACMA repeatedly refers to "community standards" as the primary justification for its recommendations in the Options Paper. However, the commercial radio industry has significant concerns regarding the way in which the ACMA has assessed community standards. It is vital that the meaning of community standards is critically

explored, as an incorrect assessment will mean that an appropriate balance between community protection and efficient regulation cannot be achieved.

39. The ACMA relies heavily on the Radio Content Research and the Advertiser Research. The Advertiser Research contains significant limitations, as detailed in Professor Glaser's report[4], and appears to be an inadequate basis for such significant public policy reform. The Listener Clip Research concludes that some listeners have difficulty distinguishing some integrated advertising matter from other content, CRA is concerned by the way in which the questions were framed. In the Radio Content Research listener were asked "Which of the following descriptions best apply to the clip you've just heard. You can indicate more than one response." Notwithstanding that more than one response could be given, the use of the word "best" suggests to the listener that an overall descriptor is appropriate, if the listener is capable of doing that. In other words, because "best" is a superlative which suggests one answer, not all listeners would have given multiple responses even though permitted to. A simpler and more effective question would have been "Do you think this clip had any paid advertising content?"

40. Even leaving those concerns to one side, the key question is the most appropriate way of addressing the issue of integrated radio advertising. It is very relevant that while listeners may not be able to distinguish whether a particular "plug" is paid advertising, they are generally aware of the practice. Furthermore, the difficulty of distinguishing advertising from other content is now widespread, due to product placement, the use of cooking, reality and other programs with extensive in-built promotion and brand sponsorship of athletes and celebrities. To take a simple example, in a televised cooking show no viewer will know whether the brand of soy sauce used has been chosen because the chef believes it to be the best or because it is an advertiser's brand. However, it would make very boring television if, each time the chef used an advertised product, she or he was required to say "This is brand x who have an advertising arrangement with this station, the details of which are xxx." Radio, which has only voice available and none of television's visual cues, becomes even more boring. This in turn affects audience interest and revenue, noting the regulatory premise that commercial television and radio services are advertiser funded.

41. The ACMA appears uncritically to equate "community standards" with the findings of this research. Apart from the unreliability of this research, the industry has grave concerns regarding the weight afforded to it by the ACMA. In particular:

    - the ACMA dismisses other evidence, such as the limited public participation in the Standards Review and the number of complaints received by licensees over the past 10 years;

[4] Attachment 1.

- the ACMA does not acknowledge the limitations of the research that it relies upon and does not provide any critical analysis of the findings. This casts doubt on the credibility of the ACMA's conclusions, as research of this type can only ever offer an insight – rather than an answer – as to the nature of community attitudes; and

- the ACMA's conclusions appear to draw more from some parts of the research than others. Examples of instances where the ACMA research does not support the ACMA conclusions are given below.

42. An example of the ACMA's assumptions regarding the value of its own research, the meaning of community standards, and the flawed conclusions that it draws, is below. The analysis relates to the question of whether the Advertising Standard might be replaced by a code:

    - the ACMA starts by dismissing the industry's assertion that the small number of investigations and breaches of the Advertising Standard suggest that continued regulation under a standard is not necessary;

    - without any supporting analysis, the ACMA states that it "does not consider that the small number of breach findings is sufficient evidence of the existence of appropriate community safeguards";

    - the ACMA goes on to refer uncritically to its own research, which it says shows that "certain advertising types that are prevalent on commercial radio make some content difficult for listeners to distinguish as advertising". The ACMA does not acknowledge either that its own research might have limitations or that it should be balanced with other types of evidence relating to community attitudes;

    - from this, the ACMA surmises that "a difference still exists between industry and community understanding of what advertising practices makes content discernible as advertising and therefore acceptable on commercial radio"; and

    - lastly, the ACMA concludes that "this disparity in understanding the community standards around advertising on commercial radio indicates that a program standard may remain an appropriate way to regulate industry".[5]

43. The ACMA's assessment of "community understanding" appears to be based solely on its own research, with no acknowledgement of its limitations and no acknowledgement of conflicting evidence, such as the number of complaints made by listeners over the past 10 years, or the limited participation in the public

[5] Page 8, Options Paper.

consultation phase of the Standards Review process. Nor does the analysis address the most telling piece of evidence in the ACMA's own research- Table 3, which evinces no practical audience concern in relation to separation of advertising and other content. In that regard CRA refers to the discussion above at paragraph 18 ff above.

Critique of the ACMA research

44. Attachment 1 is an expert analysis of the ACMA's research by Professor Stan Glaser. Importantly, Professor Glaser found in relation to the Listener Attitudes report that:

- "The validity of the findings in first study, "Community attitudes to radio content," are suspect because of considerable shortcomings in questionnaire design. These deficiencies make it highly unlikely that the results can be regarded as an unbiased reflection of community attitudes or behaviour. Hence, I have concluded that the translation of these results into public policy is unwarranted." (see page 2 of Glaser Report)

- Professor Glaser identifies four key findings at page 2 of his report regarding these shortcomings. It is of note that Professor Glaser found that the report's findings are difficult to reconcile with ACMA data.

- The ACMA's report assumes that there is audience concern about commercial radio and lacks filter questions for example, to establish if anything had caught a listener's attention on commercial radio in the last week. This serves to increase the number of responses that there is a concern (see for example page 7 Glaser Report)

- The questions are poorly worded and bundle too many concepts together, so that it is difficult to know what the respondent is objecting too (see for example pages 10-11 Glaser Report)

- In several questions the absence of information about a "Don't know" answer is likely to have skewed answers (see for example pages 11 to 13, 16 of Glaser Report)

- Extrapolations about the number of complaints by survey respondents do not match known reality and suggest that the validity of the survey results must be questioned (page 19, Glaser Report)

- The survey tends to have a social desirability bias and may have an acquiescence bias (page 19, Glaser Report)

45. Professor Glaser concluded that (page 21):

> Using a standard survey methodology a questionnaire is administered, via telephone, to a random sample of Australians aged 15 years and over. The sampling methodology is generally sound. However the questionnaire administered has numerous design flaws. These relate to significant problems in the wording of questions, which make responses to these questions difficult to interpret. The structure of the questionnaire can also lead respondents to answer questions in a way that indicates issues have salience for them when, in fact, they may not. There are other factors, such as the press to give socially acceptable responses, which may have influenced community responses to the questions. These should have been taken into account in designing the questionnaire. In addition, responses in the questionnaire, which indicate a level of community action, are not supported by comparable data of what people actually do.

46. The result of all these factors is that the findings are likely to have overstated community concern about commercial radio. As Professor Glaser points out, this is reflected in the discrepancy between surveyed radio complaints and known data on radio complaints, which are wildly divergent. Moreover, Table 3 is directed to asking respondents in a concrete and practical way what concerns they had found when listening to radio, and none has identified the subject matter of the present review as an area of concern. This is consistent with other known data, such as the relatively low level of complaints about Standard breaches and the lack of public interest in the review, as expressed in attendance of public meetings or twitter. It is very unsafe to rely on the findings in the Listener Attitudes Report.

47. Professor Glaser also had some criticisms of the Radio Content Research, but they were not as significant. His conclusion was that:

> The major research objective was to determine the extent to which radio listeners could distinguish advertising from other radio program material e.g. talk back format, live read, commentary etc. The mechanism for achieving this was to embed audio clips into an on-line questionnaire completed by a national sample of commercial radio listeners aged 17 years and over. As a result respondents were answering a standardised suite of questions for each of the seven audio clips presented. Each clip could be regarded as a concrete stimulus in the sense that it was a section of broadcast material selected from a radio program that had gone to air. Respondents were not primarily answering questions about aspects of broadcasting material (e.g. advertising) in general.
>
> A secondary objective was to assess the attitudes to and concerns listeners may have about advertising and sponsorship.

> In my view the major objective of this study was achieved. The results provide useful information about the cues listeners use in identifying and discriminating between advertising and other broadcast material.
>
> Questions to answer the secondary objective were partially effective, particularly those addressing the concerns people may have with different formats in which advertising is presented. However some of the caveats raised about the questionnaire used in the "Community attitudes to radio content" study can also be applied to question construction in the latter parts this questionnaire i.e. the questions designed to measure "probability" and "attitudes."

48. Professor Glaser found that in relation to this piece of research that:

> "… it would be unsafe to rely on the report to form conclusions in relation to community attitudes to advertising on commercial radio, particularly as a basis for public policy, as this research is only partially effective. On the other hand, the research findings in relation to listener responses to particular radio clips is, given the constraints of the survey methodology employed, soundly based and provides reasonably firm evidence in relation to the matters researched." (page 3 Glaser Report)

49. CRA has other comments on the Radio Content Research (see paragraph 39 above), but it does not take issue with the primary point, that some method should be used to permit listeners to identify advertising content. The question is the most appropriate method of doing that, having regard to other factors, including that in actual listening this is of very low concern to listeners (see Table 3), having regard to the regulatory policy in section 4 of the BSA and that integrated advertising models are being used increasingly in media (partly in response to audience preference for programs which "flow" without interruption).

50. As previously noted, there is no evidence of continuing breaches of the Standards. There have been only 9 complaints in relation to the Standards in the past 10 years, with 6 of those being found by the ACMA to be breaches. It is difficult to reconcile these figures with an argument that there is significant community concern regarding the issues regulated by the Standards.

51. The ACMA's own research contains statistics that evidence a lack of community concern regarding the issues of advertising and disclosure on commercial radio. There are numerous examples of this in the Advertising Research, of which a small selection is below.

- 54% of listeners agreed that "*integrating advertising with other program content on commercial radio is acceptable, so long as advertisers are*

identified at least once during the program". A further 22.9% neither agreed nor disagreed, leaving only 20.6% who disagreed with the statement.[6]

- There was little support amongst listeners for disclosure announcements, with 56.8% of listeners agreeing that "*it is annoying when presenters interrupt their programs with disclosure announcements to make listeners aware of their sponsorship arrangements*". A further 25.9% neither agreed nor disagreed, leaving only 16.5% who disagreed with the statement.[7]

- A significant level of sophistication among listeners was demonstrated, showing that listeners believe that advertising may be integrated into other program content. Only 22.3% of listeners disagreed with the statement that "*blurring of advertising and other program material is inevitable on commercial radio*".[8] This may be a result of familiarity with integrated advertising through media such as television and cinema and could suggest that listeners are less likely to be misled by advertising than was the case 10 years' ago.

- Listeners also showed significant awareness of the commercial realities of commercial radio broadcasting, with only 16.3% disagreeing with the statement that "*advertising on commercial radio doesn't bother me because it's a business that relies on advertising to operate*".[9]

TOTAL WELFARE IMPACT OF PROPOSALS

52. The Competition Economists' Group conducted an independent analysis of the proposals set out the Options Paper. As set out in the introduction to its report (Attachment 2), the CEG's approach was to undertake a cost/benefit analysis using a "Total Welfare Standard", which compared the costs and benefits of the current regime with the counterfactual of increased regulation or of a prohibition on integrated advertising on commercial radio. In addition CEG were asked to provide a critique of the ACMA's research paper, *Reform of the Commercial Radio Standards: A review of the expected economic costs*, March 2011.

53. In summary form, CEG found that (pages 4-5 CEG Report):

    - The ACMA's analysis of the economic/welfare impact of its regulatory proposals is deficient, as it has not weighed the benefits and costs of amending the Standards;

[6] Page 36, Advertising Research.

[7] Page 36, Advertising Research.

[8] Page 36, Advertising Research.

[9] Page 36, Advertising Research.

- Live reads and integrated advertising that are in the nature of product endorsement are likely to be welfare enhancing and merit, at most, modest disclosure requirements;
- A tightened Advertising Standard is likely to create a welfare loss to society by reducing the benefits to consumers of media and advertisers and imposing compliance costs on the industry.
- There may be a stronger case for regulating commercial agreements that are broader than product endorsement – such as agreements to promote a particular industry or the attributes of a company.
- The benefits of broadening the Disclosure Standard to include infotainment programming would likely be negative.
- If the broadened Disclosure Standard captures agreements with the licensee relating to product endorsements it is likely to be unworkable and/or highly costly to comply with.

54. Like the ACMA, CEG used the accepted economic methodology of a "Total Welfare Standard" to assess the costs and benefits of the regulatory options under consideration. Importantly, however, CEG found that the ACMA's "TWS" analysis was deficient in several respects. Firstly, ACMA's analysis does not appear to have undertaken any substantive assessment of the benefits of each of the regulatory options under consideration. In that regard evidence of community concern is not of itself a "regulatory benefit". CEG are critical of the ACMA's reliance on its Advertising Research and Listener Content Research as a methodology for determining if greater regulation is required. These criticisms are quite separate from those of Professor Glaser (neither Professor Glaser nor CEG read or was even aware of the content of each other's reports).

55. As CEG note at paragraphs 9 and 10 of their report:

> 9. We note that the ACMA relies on the outcomes of its survey of community attitudes to radio content as evidence of a need for regulation (ie, the existence of benefits). In our opinion, the ACMA's survey of community attitudes is both an inaccurate and biased indicator of the benefits of regulation. This is because a strong elicited desire for regulation need not be associated with large net benefits – any more than a strong elicited desire for shorter waiting lists at public hospitals is an indication of the net benefits of substituting resources to hospital spending and away from the production of other goods and services.
>
> 10. The use of surveys to determine regulatory policy directions is fraught with the risk of unintended consequences. This is true even for the most well designed survey because respondents are inevitably (rationally) ill informed about the complex consequences that can flow from regulation. However, this is especially true of the ACMA survey as it does not include any quantitative assessment of consumer attitudes towards the (counterfactual) effects of regulation. In fact, to the extent that the ACMA has sought qualitative data on consumer attitudes on extended disclosure

announcements or additional spot schedules, it shows that nearly as many listeners found disclosure announcements annoying and that spot advertisements interrupted their listening pleasure.

56. Notably, in relation to consumer benefit, CEG found that the evidence indicates that any regulatory proposal which shifts integrated advertising to spot advertising is very likely to be negative (paragraph 25 CEG Report).

57. CEG found in relation to the direct costs of additional regulation that (see Table 1 of CEG Report):

- The direct industry costs of compliance with the current Advertising Standards were likely to be around $6.1 million per annum. .
- The industry costs of compliance with the current Disclosure Standard were likely to be around $2.4 million per annum.
- Banning live reads would reduce producer surplus by approximately $83.7 million and consumer surplus by as much as $291 million, using an economic model to quantify consumer surplus.
- A more prescriptive Advertising Standard would have substantially higher industry costs, being approximately $4.8 million in industry training and $3.3 million in costs in renegotiating contracts to deal with more prescriptive regulation.
- A broader Disclosure Standard could have very impose very large costs on industry. The direct costs are estimated at $3.5 million per annum for expanding the disclosure to other persons involved in current affairs programming and $2.8 million in direct costs for expanding disclosure infotainment program costs. In addition, CEG has estimated costs to industry of $21.8 million in relation to monitoring costs. If required by regulation hourly disclosure announcements would involve losses or costs of around $21 million per annum.

58. Note that there are other costs of regulation which are discussed in CEG's Report (that is, the costs set out above are not the entire cost of increased regulation, which are more fully explored in the body of CEG's Report). The analysis of industry costs is supported by a survey of actual station costs undertaken by CEG independently of CRA (that is, CEG designed and administered the survey in order to ensure its integrity). The analysis highlights both the substantial cost of the current Standards and the greatly increased costs of any expanded Standards, in circumstances where the net consumer benefit as found by CEG is likely to be negative or zero. The CEG analysis is a very strong endorsement for a lowering of regulation.

59. For completeness, it should be noted that Appendix B of the CEG Report contains a critique of the econometric analysis previously undertaken by the ACMA (noting that this analysis did not, and was not intended to, be a TWS analysis of the kind undertaken by CEG).

REVOCATION OF THE ADVERTISING AND DISCLOSURE STANDARDS IN FAVOUR OF A CODE

60. The Options Paper proposes two possible reforms: first, to vary aspects of the current Advertising and Disclosure Standards or, second, to revoke the Standards in favour of an industry code.[10] The commercial radio industry supports the second proposal.

Environmental Conditions

61. The commercial radio industry submits that the environmental conditions – particularly the culture of industry compliance, the economic incentives to making a code work, and the increased sophistication of the Australian listening audience – now favour the move from a Standard to a code.

62. The environment in which the regulation is now operating is very different to that into which it was introduced. **Firstly, l**icensees are aware of their obligations under the Advertising and Disclosure Standards and take significant and costly steps to ensure compliance. For example:

- licensees have extensive compliance programs, as evidenced by the ACMA's recent audit of the Compliance Standard; and
- presenters are familiar with the requirements under the Disclosure Standard and are careful to disclose commercial agreements, as evidenced by the high compliance levels.

63. The success of this process is reflected in the very low level of community complaints and breaches. There have been only 9 complaints in relation to the Standards in the past 10 years, with 6 of those being found by the ACMA to be breaches.

64. The recent ACMA compliance audit indicates extremely high levels of compliance among commercial radio stations. It showed 100% compliance with the requirement to develop, maintain and implement compliance programs among stations with current affairs programming and 96% compliance across the rest of the industry.[11]

65. Any regulation now needs only to ensure continuing compliance in an industry that is already showing high levels of compliance. This task may be best achieved through a code, rather than through a Standard.

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[10] Pages 6 and 15, Options Paper.

[11] Issues Paper, page 52.

66. **Secondly**, listeners are more sophisticated than they were in 2000, when the Standards were introduced. They are familiar with integrated advertising in television and cinema, and less likely to be misled by advertising. This is demonstrated by the ACMA's Advertising Research.[12]

67. In order to identify any necessary community safeguards, the ACMA must consider carefully what "harm" any regulation is intended to address. The "harm" in relation to the Advertising and Disclosure Standards is the possibility of listeners being misled or deceived into believing that content is an independent viewpoint or news item, when in fact it is the result of a commercial agreement.

68. As previously noted, the familiarity that listeners have with the integrated advertising practices that are commonly used on other media platforms[13] makes them much less likely to be misled or deceived than was the case 10 years' ago. The likelihood of them suffering such "harm" has decreased. In this environment, it seems appropriate to relax the applicable regulation, to reflect the experience of the listening community.

69. **Thirdly**, Australian market conditions have altered, so as to make the burden of the Standards on the commercial radio industry disproportionate when compared burdens imposed on other media.

Disclosure

70. The only commercial arrangement disclosure obligation imposed on commercial television obliges licensees to disclose any agreement under which the licensee, presenter or independent producer endorses or features a third party's products or services in a factual program in exchange for consideration.[14]

71. There are a number of significant differences between the disclosure regime applicable to commercial television and that applicable to commercial radio.

- *Television*: the disclosure obligation is contained in a Code of Practice.
- *Radio*: the disclosure obligation is contained in a Standard.

- *Television*: the disclosure may be made during or in the credits of the program. There are no prescriptive requirements other than that the disclosure announcement must be "readily understandable to a reasonable person".[15]
- *Radio*: on-air disclosure announcements must be broadcast "at the time of and as part of" the broadcast of material caught by the Disclosure Standard.

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[12] Pages 33 and 36, Advertising Research (discussed above).

[13] For example, Channel 10's *Masterchef* on free to air television, which contains extensive advertising through product placement, integrated through the program. No disclosure is made until the end of the program, some episodes of which run to 90 minutes.

[14] Codes 1.19 to 1.23 Commercial Television Industry Codes of Practice, January 2010.

[15] Code 1.23, Commercial Television Industry Codes of Practice, January 2010.

- *Television*: disclosure relates only to agreements to feature or endorse products in a specific program.
- *Radio*: a much wider range of agreements are caught, including any agreement under which a presenter earns more than $25,000 per year.[16]

- *Television*: disclosure relates only to the endorsement or feature of products or services.
- *Radio*: disclosure relates to a much broader range of material, including: any mention of the name, product or service of the sponsor; any material that directly promotes an issue directly favourable to the sponsor; and any material in which an agent or employee of the sponsor is interviewed in relation to a matter concerning the sponsor.

Advertising

72. The Commercial Television Industry Code of Practice provides that commercials in between programs, during commercial breaks or superimposed over a program, must be distinguishable by viewers from program material.[17]The television codes also allow advertising within programs, provided that the material is "*distinguishable from other program material, either because it is clearly promoting a product or service, or because of labelling or some other form of differentiation*".[18]

73. Radio is the subject of much more stringent regulation:

- The requirement to differentiate advertising from other program content is contained in a Code for television and in a Standard for radio.

- There is no equivalent to television's Code 1.18, expressly allowing advertising within programs (known as "integrated advertising"), provided that the advertisement is distinguishable from other program material.

74. **Fourthly**, Australia is becoming increasingly out of step with international regulation. The ACMA asserts that in the UK "the complete separation of editorial and other radio content is required in all programs".[19] This is incorrect. The UK has recently liberalized its rules relating to integrated advertising and disclosure. Since February 2011, paid references to products and brands have been permitted in the UK. Previously, the only commercial references allowed on UK radio were sponsorship credits around programs and advertisements broadcast in commercial breaks. The new rules permit commercial references to be integrated within programming. Ofcom adopted the following option, out of a number of possibilities on which it sought comment (and which is discussed at paragraphs 34 ff above):

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[16] Section 6, Disclosure Standard.

[17] Code 1.16, Commercial Television Industry Codes of Practice, January 2010.

[18] Code 1.18, Commercial Television Industry Codes of Practice, January 2010.

[19] Page 26, Options Paper.

- **Option C** *Allows the integration of commercial communications and programming (except in relation to spot ads)* This option would remove the principle of separation between commercial communications and programming except in relation to spot ads (which would need to remain distinguishable from programming). This would give radio stations wide discretion to integrate, for example, paid-for, promotional commercial references into programming provided these were transparent to listeners.

Features of the regulatory scheme

75. The commercial radio industry would work cooperatively with the ACMA to agree advertising and disclosure codes to replace the existing Advertising and Disclosure Standards. Until codes are agreed, the existing Standards will remain in force.

76. Under the provisions of the BSA, no code can be registered unless the ACMA is satisfied that it provides appropriate community safeguards.[20]

77. The new codes would be enforced by the ACMA. If a listener believed that a licensee had breached the codes, s/he would be entitled to complain to the station and, if not satisfied with the station's response, could complain directly to the ACMA. The ACMA would then investigate the complaint, and could impose a sanction of its choosing on the licensee.

78. The possible sanctions for breach of a code could include an enforceable undertaking or an additional licence condition under section 43 of the BSA.

79. If, once registered, the codes did not appear to work effectively to safeguard community standards, the ACMA would have the option of imposing a Standard under section 125 of the BSA.

80. The commercial radio industry submits that its record of compliance with the Advertising and Disclosure Standards make it appropriate for the ACMA to embark upon negotiations for new codes with the industry. There would be no risk to the community as the Standards would remain in place throughout the code development phase and would only be removed once the ACMA was satisfied that the proposed code would safeguard community standards and should be registered.

    Lastly, the industry submits that it would be more user-friendly for the community to access the industry rules relating to advertising in one document – the Commercial Radio Codes of Practice (**Codes of Practice**) – rather than three documents – the Codes of Practice, the Advertising Standard and the Disclosure Standard. The Codes of Practice are drafted in plain English and are intended to be easily understandable by the general community. By contrast, the Standards are legislative instruments, which can appear daunting to the public.

ADVERTISING STANDARD – QUESTIONS POSED IN OPTIONS PAPER

Does the definition of "advertisement" need to be changed?

[20] Section 123(4), BSA.

81. The Options Paper suggests that the definition of "advertisement" might be changed to include a more detailed definition of "consideration".

82. The Advertising Standard currently covers all advertisements where there is both the provision of consideration and the broadcast of the advertisement. The commercial radio industry submits that this definition is adequate.

83. The ACMA's discussion of this issue confuses two concepts. One is the definition of "consideration' and the other the evidentiary onus of establishing a link between the broadcast material and some benefit. The latter will always exist and will not be remedied by the ACMA's proposed expanded definition of "valuable consideration". Nothing in the revised definition would reduce the usual investigative burden of establishing a link between the investigated activity and a breach- nor should it.

84. On the other hand, the revised definition potentially creates a wide range of fresh problems. For example, when a radio license broadcasts an interview of an advertised product or service (such a concert band), is there a benefit or not? What about when a licensee is given a promotional CD to play on-air (as occurs constantly)? Does that create a benefit to be disclosed, if the announcer then says after the playing the track "That is off the great new album by X"? The expanded definition will not resolve any of those issues, but will lead to Kafkaesque levels of monitoring and reporting for the most questionable benefit.

85. Moreover, the ACMA concludes that, by relying on the provision of valuable consideration, the regulation (i) fails to meet the community standard that all advertising should be distinguishable and (ii) fails to provide stable and predictable regulation for listeners.[21]

86. The commercial radio industry does not agree with the ACMA's conclusions. The extension of "consideration" in the way suggested by the ACMA would cause significant unpredictability, would be difficult to enforce, would impose a substantial cost burden on the industry, and is out of step with the regimes in comparable media.

87. **First**, the extension of "consideration" to include "indirect interests" or "benefits gained" in the definition of "advertisement" would place the commercial radio industry at a disadvantage when compared to other media.

88. The FreeTV Codes of Practice provide at Code 1.18 that:

> Where a licensee receives payment for material that is presented in a program or segment of a program, that material must be distinguishable from other program material, either because it is clearly promoting a product or service, or because of labelling or some other form of differentiation.

89. Accordingly, the free to air television industry is only obliged to ensure that material is distinguishable from other program content when it "receives payment" for that material. There is no suggestion in the FreeTV Code that "indirect interests" or "benefits gained" should be included in the definition of advertisement. The ACMA does not attempt to explain why the radio industry should be more heavily regulated than other media platforms.

[21] Options Paper, page 11.

90. It is difficult to understand why the potential "harm" to commercial radio consumers should be so much greater than the potential "harm" to commercial television consumers, that it would justify a significantly higher level of regulation in relation to radio.

91. The commercial radio industry submits that, where possible, attempts should be made to standardise regulation between comparable media. This is particularly important in light of the convergence of traditional and new media platforms.

92. A failure to standardise regulation will place some industries at an advantage, when compared with others, and will mean that industries using different platforms to communicate will be subject to different regulations for the same content. This would create a regime that is overly complex, being difficult for consumers to understand and for regulators to enforce. Oddly, the most onerous and complex system of regulation would be imposed on commercial radio when compared with other media sectors, contrary to subsection 4(1) of the BSA.

93. **Secondly,** the ACMA's proposed definition of consideration – *any money, service or other valuable consideration or benefit that is directly or indirectly paid, or promised to or charged or accepted in respect of the material broadcast* – is so unclear as to be almost impossible to implement. Such a definition would decrease the stability and predictability of the regulation, contrary to the ACMA's objectives.

94. The proposed definition of "consideration" would make it very difficult, in practice, for licensees to work out what content would constitute an "advertisement". The scope of "indirect" payments and benefits is unclear, as is the meaning of a "promised" benefit. The interpretation of an "indirect benefit promised in respect of the material broadcast" would be extremely subjective and difficult for licensees to predict.

95. The ACMA provides examples in the Options Paper, which it submits illustrate how the current regulation is difficult to administer, as the question of whether consideration has been given is unclear. These examples are:

- a licensee receives payment for promotional material broadcast, but receives no separate or distinct payment for similar material broadcast at a later date;
- a sponsor has an advertising agreement but a particular promotional interview is not specified in the agreement; and
- products of a sponsor are promoted while an advertising agreement is being negotiated but the agreement is not concluded.[22].

96. The industry submits that administration of the regulation would not be assisted by the proposed extension of "consideration". It would remain difficult to assess whether a licensee had received consideration. This is more a result of the ambiguous nature of those particular cases, than a deficiency in the regulation. It would not be appropriate to create a definition that automatically catches such scenarios.

[22] Page 10, Options Paper.

97. Similarly, in the above examples, it would be hard to determine whether the broadcast material was promotional or not. The extended definition might catch programs where no promotion was involved, simply because the licensee had a commercial arrangement regarding the "product, service or belief" that was the subject of the segment.

98. In all of the above examples, a licensee might be broadcasting material of its own volition with no link to any payments received or receivable. The fact that the broadcast material is similar to material that is the subject of a commercial arrangement should not automatically mean that it is characterised as an "advertisement". The commercial radio industry would object strongly to such an approach.

99. As an example of this issue, the licensee might broadcast an advertisement from a mining company on the breakfast show. The following day, a talk back presenter in the afternoon show might discuss a proposed mining tax, giving favourable comments to the mining industry, which the presenter knows will appeal to his audience. This would have no connection with the advertisement played on the preceding day's breakfast show, yet under the proposed definition it could be caught. This is but one example of the myriad of confusing and uncertain scenarios which could be caught by the proposed change.

Should advertising be distinguished at or by a certain time in a segment?

100. The discussion in this section of the Options Paper suffers from many of the flaws already discussed. Firstly, it conflates an abstract expression of support for a concept with a need to regulate, without examination of the empirical evidence. Secondly, it does not give weight to the low level of concern to be found by the empirical evidence. Thirdly, it would create a requirement on commercial radio which does not exist in any other sector, despite the relative lack of influence of commercial radio. Finally, it identifies a mischief (possible confusion of advertising content and other matter) but does not consider the effectiveness of all available options. Most importantly, it does not consider the economic effect of the proposal. This last requirement is not a mere matter of relying on CRA to put forward arguments about economic and industry impact. Subsection 4(2) requires the ACMA to undertake that process, yet it has not done so prior to proposing the option advanced.

101. Turning to the proposal itself, a requirement for contemporaneous broadcast of disclosures would be difficult and costly to administer. The cost is not merely one of lost revenue, although that is a very important consideration. Some advertisers would not undertake this form of advertising, which would be made more expensive because of the disclosure (because more airtime was required for each advertisement).

102. A greater and equally relevant cost is that over a long period radio formats have been developed and refined to meet audience demand. That demand is for free-flowing programming. Unexpected interruptions to programming cause switches in listening and listener turn-off. This is a very important consideration for commercial radio in retaining audience and advertising share in an increasingly competitive

market for advertising, in which advertisers are making major spending decisions across an ever increasing range of sectors.

103. Furthermore, when coupled with an expanded definition of advertisement, this requirement would potentially require a large number of interruptions to programming (or in practice the censoring of programming at enormous regulatory cost). The example of an announcer giving praise to a band which has provided a free promotional CD is an example in point. Even when there is a value threshold, that band might have advertised concerts which exceed the threshold, leading to quite innocent and spontaneous comments that require immediate sponsorship announcements. In practice this requirement would change the entire nature of radio programming, which relies in spontaneous conversational elements for its appeal- this is the case not only with talkback, but all programming, in which an announcer shares thoughts, information and conversation with her or his audience. The band example is a good one, because quite innocuous comments would require a disclosure. For example, where a band has advertised a new album or concerts, immediate on-air disclosure could be required for very ordinary and innocuous statements such as:

- "What a great band these guys are!" (A positive comment about an advertised band)
- "Call in and tell us if you liked them" (Arguably inducing listener support for the band)
- "They're off the LA next week to record their new album- I can hardly wait!" (Promoting the band's new album.)

104. Yet all these statements are made regularly and innocuously. The real point is that the requirement if imposed would change the nature of radio programming in sweeping ways, making it very unattractive to listeners. This would occur because of the response required by radio stations. One option for stations would be not to make such statements in order to avoid the cost of regulatory compliance. This would make commercial radio a very bland and un-spontaneous service, undermining the very reason people listen to it. The alternative would be to have an expensive monitoring and compliance regime, with immediate on-air announcements made every time comments such as those set out above were made. That would also transform radio into a very different and relatively unattractive service.

Is the 'reasonable listener test' sufficient to establish whether advertising is distinguishable?

105. CRA submits that a reasonable listener test is not appropriate, if the intention is to create a hypothetical abstract listener who is not related to the expected listening audience of the program. Commercial radio consists of many different formats/styles which attract listeners with very different demographics and backgrounds. Different demographics need different levels of assistance to determine whether advertising is distinguishable (the Advertising Research demonstrates this). The issue of whether advertising is distinguishable can only be resolved by considering program audiences.

106. A 'listening audience' test reflects the Code of Practice provisions regarding offensive content (see for example Code 1.3). It is a consideration taken into account by ACMA in its Code investigations and ensures that the regulatory regime work in a practical rather than a hypothetical way.

107. Of particular note, the conclusion that "there is a material gap between industry and community views on whether such integrated advertising is sufficiently distinguishable as advertising" is not correct or an assessment of all relevant factors. Those factors include actual listening concerns (as evidenced by Table 3) and the effect of constant on-air disclosures on both industry costs and revenue **and** the listener experience of radio, which would be seriously degraded. There is also a question of proportionality, with the proposal put forward imposing very detailed regulation with a reasonable person test not found in other areas of media.

ADVERTISING STANDARD – PROPOSED REFORM OPTIONS

108. For the reasons already set out in these submissions, CRA supports Option 2, being the development of a relevant Code. Briefly restated, those reasons include:

- A very different environment from 2000, when there were no mechanisms in place to address the issues addressed by the Standards. The industry now has well developed structures in place and has had very high levels of compliance.
- The inappropriateness of a Standard, as a legislative mechanism, when in fact breaches have been few and clustered around a very small number of announcers.
- Extremely low, and perhaps non-existent, levels of audience concern in actual radio listening, as set out in Table 3 of the Listener Report.
- Corroborating evidence of this low level of listener concern, as evidenced by very low public interest in this inquiry and a relatively low level of complaints and investigations in relation to this issue.
- Proportionality with other media, in circumstances where radio is currently subject to the highest level of regulation.
- Consistency with the regulatory policy set out in section 4 of the BSA and the objects of the BSA when taken as a whole.
- The very unreliable nature of some of the research used to support the Standards option, as set out in the critique by Professor Glaser.
- Very effective industry Code structures. Commercial radio now has a history of almost 20 years in the administration of industry Codes. It has a stable industry structure and a well-resourced industry body in CRA.

- High levels of industry compliance, as found by the ACMA's research.

- The very questionable benefit of increased regulation, when compared with the cost, as demonstrated by the CEG report at Attachment 2. In that regard CEG found, adopting a Total Welfare Standard methodology, that the consumer benefit of increased regulation was very likely to be negative.

DISCLOSURE STANDARD - QUESTIONS POSED IN OPTIONS PAPER

Is there a benefit in maintaining a program standard?

109. The benefit of preferring a Standard to a Code is not obvious. As is well known, a Standard permits complaints to be made directly to the ACMA and as a legislative instrument, breach of a Standard has more immediate consequences attached to it than a breach of a Code. This of itself is not a reason for a Standard (otherwise all industry compliance would be undertaken through Standards, as occurred prior to 1992).

110. This raises the general policy question of the circumstances in which a Standard is to be preferred to a Code. There is important guidance in the BSA itself. Firstly, the object at paragraph 3(h) is to "**encourage** providers of broadcasting services to respect community standards." The word "encourage" stands in contrast to several other objects which use the word "ensure", which is a very strong indication that the legislature envisaged that matters relating to community standards would be dealt with by Codes and not legislative mechanisms such as Standards in the first instance.

111. Paragraph 123(1)(j) also provides that Codes may relate to "such other matters relating to program content as are of concern to the community". The issues under consideration are matters relating to program content and appropriate for a Code. Furthermore, the commercial radio sector has a well established and stable Code structure and practice.

112. In addition, the very high levels of industry compliance with the Standards indicate that there are likely to be very high levels of compliance with a Code. This is also a strong indication that regulation by Code is appropriate. If there are consistent breaches by some licensees, the ACMA has ample ability to apply corrective measures, including individual licence conditions. Indeed, the fact that breaches to date have been clustered around individual announcers and licensees is evidence that any further breaches are appropriately dealt with by licence conditions, rather than a Standard which applies across all licensees. However, in CRA's submission the starting point should now be development of an appropriate Code.

What program formats containing matters of public interest should regulation apply to?

113. Practical experience is that listener concern in terms of listening is low (see paragraphs 18 ff above). Moreover, the incidence of breaches is clustered around current affairs and talkback programs. CRA therefore submits that the regulatory regime should apply only to current affairs and talkback programming.

Is the definition of "commercial agreement" adequate?

114. CRA submits that no change is required for the reasons already set out. The case for extending regulation in terms of audience concern is low. A more extensive and far-reaching definition regarding "consideration" is likely to have unintended consequences, without commensurate benefit, as set out above. The current definition of a commercial agreement as an "agreement, arrangement or understanding" is already very wide-ranging. As established case law makes clear, "arrangements" and "understandings" include things that are not legally enforceable, such as expectations. That is already a very wide concept.

Whose agreements should a commercial radio licensee be responsible for?

115. CRA is very concerned about the extent and complexity of this obligation, if implemented. There would be a very large cost if licensees were responsible for presenters' agreements, licensees' agreements and any other agreements where the person concerned has significant influence on the content of material broadcast. A simple example would be the talent used to produce an advertisement. Each of the copywriters, voiceover artists, composer and musicians has influence over "the content of the material broadcast". Yet in many cases the license has no control over those persons, does not know who they are and will not be in a position to find out. This is but one simple example of the complexity of the proposal.

116. Such a requirement would also have interpretive difficulties. For example, what disclosures would be required in relation to shares in an advertiser held by a producer or a senior executive? The level of disclosure required would ultimately be similar to that of Parliamentarians, with constant changes to a register of interests at enormous cost but with very little public benefit. Using the share example, would an executive or producer need to make a disclosure every time she or he traded shares in an advertiser? What about shares traded through a super fund? Alternatively, what about other arrangements which occur all the time (such as paid attendance at an advertiser's conference or vice versa)? The point is that every arrangement entered into would need to be scrutinized to determine if disclosure was required. The width and vagueness of the obligation would impose very high and unworkable administrative and legal burdens.

117. By way of further example, would the obligation extend to licensee agreements in perpetuity? When would a licensee know when the obligation ceased? It is frequently the case that an advertiser will engage in a "campaign", and then cease advertising for some period. A license has no way of knowing whether the advertiser is "dormant" or is no longer an advertiser with that licensee. As a negotiating tactic, advertisers regularly threaten to withdraw advertising (and sometimes temporarily do so). It would be very difficult to administer the proposal in relation to those situations. Moreover, these situations represent thousands of everyday business transactions undertaken in the normal cut and thrust of commerce. A sales representative might

be told that no further advertising would be undertaken, with the effect that an advertiser is taken off the disclosure register, only to be advised the following week that the advertiser would negotiate further advertising. As a prior advertiser negotiating fresh advertising, should the advertiser be disclosed, or does the withdrawal of advertising for one week cut that nexus? Would the advertiser's status be different if no withdrawal had been made?

118. Yet further issues arise with related companies. A large corporate conglomerate will have a wide range of related companies and different brands. It will be impossible for a licensee to know all of those relationships. For example, if a licensee broadcast advertisements for Coles (as occurs regularly), would a statement in support of mining by an announcer be a breach because Coles is owned by a company with mining interests?

119. These examples also reflect the enormous resources which would need to be garnered by commercial radio, at crippling cost. On the revenue side, the flow and appeal of commercial radio would be completely broken up by constant on-air disclosures that would not benefit the listener, but annoy them. In that regard a very clear result of audience research undertaken over many years is that audiences prefer free-flowing programming which is unobtrusive to the ear. The proposal would result in a dramatic decrease in radio as a medium with audience appeal, with disastrous revenue consequences. Ofcom noted in its research that audiences find disclosure announcements irritating (see paragraph 37 above).

120. The FCC's so-called "Payola Rules" merit some discussion, because they reflect some elements of the option now under discussion. As is the case with the UK material, it would be wrong to translate a system of regulation from one jurisdiction to Australia without the cultural, institutional and legal foundation relating to that form of regulation. The FCC Payola Rules apply across all broadcast media. This is a far cry from the Options Paper, which proposes a very specific set of rules for commercial radio that involve far higher regulatory imposts than any other form of media or communication. As previously noted, that is inconsistent with the regulatory policy at section 4 of the BSA. Furthermore, the Payola Rules include some 36 rule-based examples of when they apply, as well a large of FCC case law extending over 50 years. Rules and exceptions of that nature would become complex and confusing if imposed in a very different Australian context.

What is the best way to support transparency?

121. CRA does not agree with any suggestion that the editorial independence model should be adopted as a regulatory model for the BSA. This would represent a major shift in broadcasting regulation in Australia, involving debate and dialogue well beyond the question of the Standards. An editorial independence model, if adopted, would logically need to be applied across all sectors- with greater rigour than to the commercial radio sector, which has relatively low levels of influence. To avoid doubt, CRA does not support this broader proposition, but is concerned that a major change in the direction of regulatory policy should not be undertaken by a sidewind such a review of the Standards.

122. In that regard the BSA already addresses the question of news and current affairs. The object at paragraph 3(1)(g) is to "encourage…broadcasting services to be responsive to the need for fair and accurate coverage of matters of public interest…". A Code addresses that issue, as set out by section 123(2)(c), through promotion of "fairness and accuracy in news and current affairs programs". The legislature has not mandated that fairness and accuracy be achieved by a doctrine of editorial independence- if that was envisaged, it would have been easy enough for the legislature to say so. Instead, it is left to the industry to determine how to best achieve the relevant objective.

123. It would be a very odd result if the BSA did not mandate any doctrine of editorial independence in the area of most direct relevance to that doctrine, being news and current affairs, yet envisaged that the doctrine would and should apply to advertising. The simple and correct conclusion is that the legislature did not envisage regulatory intrusions of that nature.

124. Moreover, the test of editorial independence is notoriously difficult to apply. A good example by analogy were the complaints made about intrusion by Canwest in the affairs of Network Ten, which were not upheld but required enormous investigative resources to determine them. So too, a doctrine of editorial independence could lead to a very wide range of complaints. For example, a disgruntled employee could complain that she or he had received no pay rise (or been moved sidewise) because of a refusal to permit certain types of announcements to be made. The regulatory resources required to determine if such an employment decision was in fact made and whether made for legitimate employment-related reasons or for the reasons asserted are enormous, equating to those required for a large piece of litigation. This example is chosen quite deliberately, because some of the Canwest allegations were indeed made by a disgruntled ex-employee.

125. Quite minor scheduling, programming and related decisions could be examined to determine whether there had been adherence to the principle of editorial independence- examinations of a type and to a level of minutiae that were never envisaged by the BSA. In that regard thousands of decisions are made in the conduct of a media business every day that could be affected by such a doctrine. As a simple example, if an announcer discussed with her or his producer the topics that the announcer proposed to discuss that day, and the producer put the view that climate change had been discussed too much and should be given a rest, was that opinion given independently or having regard to advertising by a supplier of coal-fired electricity? Would there be regulatory overview of how much discussion was "too much"? How would it be taken into account that other licensees had maintained discussion of climate change or that media experts disagreed with the assessment of the producer (with the inference that the producer had allowed advertiser concerns to influence her or his view)? Those questions can very quickly take on the proportions of a royal commission, in the context of an enactment which leaves to the industry to determine how best to achieve fairness and accuracy in news and current affairs, but by a side door would introduce far more unwieldy and intrusive regulation of the relationship between advertising and announcer comment. As a matter of regulatory consistency and policy, that would be a very strange result indeed.

What form and timing requirements should apply if there is on-air disclosure?

126. CRA supports disclosure in accordance with a Code under which disclosure is made at logical program breaks such as at the end or beginning of the hour, combined with website disclosure. As already noted, noted more extensive on-air disclosures will have major cost and revenue impacts, as well as greatly affecting the listener appeal of radio.

What register and notification arrangements are appropriate?

127. CRA agrees that current regulation in relation to register and notification is inefficient and inappropriate. These requirements could be streamlined. It is also unnecessary to include information such as the value of the advertising, which is typically commercially sensitive and relevant to rivalrous behavior between broadcasters and other media sectors (in that regard it does not promote competition between broadcasters to signal the share of an individual advertiser's spend secured by a broadcaster). In addition, the value of the advertising is not relevant to the "mischief" being addressed, which is that audiences should be aware when announcements have been paid for or potentially influenced by a payment. The disclosure of the fact of an agreement addresses that mischief. Relevantly, other media also do not disclose the value of their sponsorship arrangements. It is consistent with section 4 of the BSA that notification requirements relate only to information that is adequate to address the relevant regulatory concern,

DISCLOSURE STANDARD – PROPOSED REFORM OPTIONS

128. CRA supports Option 2, being the introduction of a Code, for the reasons previously summarized at paragraph 108.

129. Option 3 is an editorial independence model, which is not reflected in the regulatory premise underlying the BSA, is contrary to section 4, is not a proportionate response to the issues, would impose enormous costs and be unworkable, as demonstrated by the CEG Report.

130. Option 1 is proposed amendment of the current Standard. For the reasons previously set out, the case for continuation of any Standard is very low. The proposals set out under Option 1 are in many cases uncertain, very far-reaching and would impose large compliance costs, while eroding commercial radio revenue by rendering radio less attractive to audiences. In addition, as set out in paragraphs 18ff, the level of public concern in the context of actual radio listening and experience of radio is low.

COMPLIANCE PROGRAMS – QUESTIONS POSED IN OPTIONS PAPER

Is there a benefit in maintaining a program standard?

131. CRA agrees with the ACMA's conclusion that the Compliance Standard is not the primary mechanism supporting compliance and that there is strong evidence that it is no longer necessary. The relevant industry circumstances as between 2000 and 2011 have changed greatly and in a manner that reflects very positively on an industry-wide compliance culture.

Is there a culture of compliance or non-compliance?

132. CRA agrees with ACMA's conclusion that there is a high level of compliance.

Is a program standard on compliance programs necessary?

133. CRA agrees with the ACMA's conclusions that compliance with regulatory obligations can be addressed through other mechanisms.

COMPLIANCE STANDARD – PROPOSED REFORM OPTIONS

134. CRA supports Option 2, being revocation of the current Compliance Standard and consideration of non-compliance on an individual licensee basis, for the reasons already set out. Individual licensee compliance has been very high and the continuation of a Standard is unnecessary and inappropriate, having regard to the BSA's policy of phased regulation, with a Standard being "last resort" regulation.

If you would like to discuss any aspect of this submission, please contact Joan Warner, Chief Executive Officer of Commercial Radio Australia, on 02 9281 6577.